IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES AND DERIVATIVE & "ERISA" LITIGATION	§ § §	MDL 1446
MARK NEWBY, et al., *Plaintiffs*, v. ENRON CORPORATION, et al., *Defendants.*	§ § § § § § §	CIVIL ACTION NO: H-01-3624 AND CONSOLIDATED CASES
JOE H. WALKER, et al., *Plaintiffs,* v. ARTHUR ANDERSEN, LLP, et al., *Defendants.*	§ § § § § § §	CIVIL ACTION NO. H-03-2345

THE OUTSIDE DIRECTOR DEFENDANTS' RESPONSE TO WALKER PLAINTIFFS' MOTION FOR RECONSIDERATION

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TO THE HONORABLE MELINDA HARMON:

On July 23, 2003, this Court correctly denied the pending Motion to Remand in the above captioned member case. On August 6, 2003, Plaintiffs filed a "Motion to Reconsider/Alter or Amend Judgment . . ." ("Motion to Reconsider") and a "Fifth Circuit Supplement to their Motion to Remand . . ." ("Fifth Circuit Supplement"), belatedly insisting upon a frail hypertechnical reed already properly rejected by this Court. Plaintiffs' sole basis for relief rests on the contention that a purported variance exists between the Circuits on the procedural point of whether alleged deficiencies in the demonstration of the parties' consent to removal may be cured.[1] This Court should not reconsider its denial of remand in the case because: (i) Plaintiffs' arguments are untimely and dilatory; (ii) unanimous consent is not even required in this case, as it is properly removed on "related to" bankruptcy grounds; and (iii) Plaintiffs' generalizations regarding federal choice of law should not apply retroactively to pleadings properly filed in accordance with the procedural requirements of the jurisdiction where the case was pending when these pleadings were submitted.

ARGUMENT

Jurisdiction and "related to" jurisdiction are both undisputed in this case.[2] Plaintiffs, however, continue to seize on a hypertechnical procedural point concerning the method by which unanimous consent was expressed when this action was removed over eight months ago. This Court should deny Plaintiffs' Motion to Reconsider for the following reasons:

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[1] Whether 6th or 5th Circuit jurisprudence is followed, consent is not required for "related to" bankruptcy removal. *See* section A(II), *infra*.

[2] The Outside Directors incorporate the arguments in their December 5, 2002 Notice of Removal, January 10, 2003 Response to Plaintiffs' Motion to Remand, and January 10, 2003 Memorandum in Support of Joint Motion to Amend Notice of Removal by Supplementation as if fully set forth herein.

I. Plaintiffs' arguments are untimely and dilatory.

Plaintiffs attempt to excuse their after-the-fact desperation filing with the explanation that they were "waiting" for a case number before filing. *See* Motion to Reconsider at 1. Nothing, of course, prevented Plaintiffs from filing their prepared Fifth Circuit Supplement as soon as the action was transferred – over two months ago – under its previous case number or, even more sensibly, the MDL 1446 caption.

Instead, Plaintiffs rolled the proverbial dice that the arguments advanced in their previously filed Motion to Remand would prevail, and, if they did not, Plaintiffs could then file their current motions in the face of an unfavorable ruling. The Fifth Circuit disapproved of similar delay tactics in *Rosenzweig v. Azurix Corp, et al.*, 332 F.3d 854, 864-65 (5th Cir. 2003) (affirming denial of leave to amend when plaintiffs made "strategic decision" to wait for a ruling, with the expectation that they would be granted leave to amend if their claims were dismissed). Despite Plaintiffs' groundless assertion that they "never had the opportunity to state their arguments that Fifth Circuit precedent should apply to the Remand Motion," *see* Motion to Reconsider at 2, they in fact could have advanced such arguments at any time prior to this Court's July 23 Order. All of the briefing that was before the Court on Plaintiffs' Motion to Remand was based on Sixth Circuit law, and at no time after transfer did Plaintiffs suggest to the Court that Fifth Circuit law should now apply. In essence, Plaintiffs' decision to hold this choice of law argument in their pocket until they saw how their motion was resolved under Sixth Circuit law amounts to nothing more than an effort to get two bites at the same apple, and should be denied.

II. Unanimous consent is not required in this case.

Even assuming that Plaintiffs' procedural points regarding the proper mechanics for indicating unanimous consent to removal are valid – which they are not – this case still belongs squarely in federal court. This Court astutely recognized this point in its July 23, 2003 Order:

> In addition, although there is a split of authority, the majority of courts addressing the issue have concluded that the unanimity rule does not apply to removal based on "related to" bankruptcy jurisdiction, and that one party may remove a case from state court under 28 U.S.C. 1452 without the consent of other parties.

July 23 Order at 10 (*Newby* Instr. No. 1579) (citations omitted).

In further support of this point, the Outside Directors incorporate herein the arguments made in their briefing in opposition to remand of other specific consolidated actions. *See Newby* Instr. 1158 (Outside Directors' Response in Opposition to the Second Motions to Remand of the Pearson Plaintiffs, the Rosen Plaintiffs, the Ahlich Plaintiffs, and the Delgado Plaintiffs, filed November 22, 2002). Additionally, since that briefing, recent authority – including other Enron litigation – has comported with the majority view noted by this Court that unanimous consent is not required for removal of an action based on "related-to" jurisdiction. *See, e.g., Connecticut Resources Recovery Authority v. Lay*, 292 B.R. 464, 471 (D. Conn. 2003); *New York City Employees' Retirement System v. Ebbers* (*In re Worldcom Sec. Litig.*), 293 B.R. 308, 330 (S.D.N.Y. 2003).

In other words, Plaintiffs' Motion to Reconsider should be denied because, even if granted, it would not change the outcome of the Court's order denying Plaintiffs' Motion to Remand.

III. Plaintiffs' broad-based choice of law proposition does not apply here.

Plaintiffs proudly cite the proposition that "[w]hen a case is transferred from a district in another circuit, the precedent of the circuit court encompassing the transferee district court applies

to the case on matters of federal law." Motion to Reconsider at 2. Plaintiffs support this with a number of cases, two of which involve the MDL context. All of Plaintiffs' cases, however, concern interpretation of substantive federal claims and substantive jurisdictional questions, rather than procedural questions regarding whether a matter of procedure was properly followed prior to transfer of the case.

The Outside Directors acknowledge that the majority rule appears to favor – for purposes of consistency and economy – transferee courts applying the substantive federal law of their own circuits. *But see, e.g., In re Plumbing Fixtures Litig.*, 342 F. Supp. 756, 758 (J.P.M.L. 1972) ("It is clear that the [federal] substantive law of the transferor forum will apply after transfer.") To the extent Plaintiffs' proposition is correct generally, certainly an equitable exception exists for technical procedural rules when one or more parties affirmatively rely on transferor circuit interpretation during the case and long before transfer.

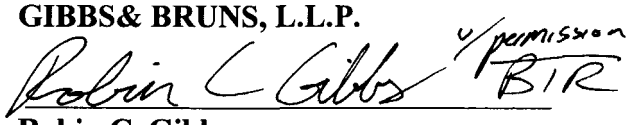
If Plaintiffs' proposition applied here, no party could rely on which procedural precedent to follow during litigation, and procedures properly followed prior to transfer could be undone or nullified after transfer by a party merely filing a motion to reconsider the matter at issue and insisting that the procedural rules of the transferee court now be applied. If that were the case, any consistency/judicial economy bases for the proposition would be largely – if not entirely – subverted.

CONCLUSION

For all of the above reasons, Plaintiffs' Motion to Reconsider should be denied.

Respectfully submitted,

GIBBS& BRUNS, L.L.P.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by sending a copy via electronic mail to serve@ESL3624.com on this the 28th day of August, 2003.

I further certify that a copy of the foregoing has been served via Certified Mail/Return Receipt Request on the following parties, who do not accept service by electronic mail on this the 28th day of August, 2003.

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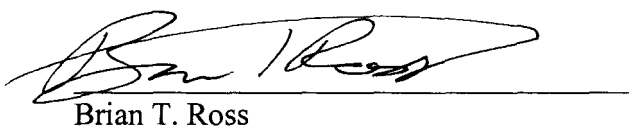

Brian T. Ross